

JOHN GILBERT vs. APC NATCHIQ, INC.  
CASE NO. 3:03-CV-00174-RRB

DEPOSITION OF MARK C. NELSON  
JUNE 15, 2006

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

JOHN GILBERT,

Plaintiff,

vs.

APC NATCHIQ, INC.,

Defendant.

Case No. 3:03-CV-00174-RRB

DEPOSITION OF MARK C. NELSON  
June 15, 2006

APPEARANCES:

FOR THE PLAINTIFF:

MR. KENNETH L. COVELL  
Attorney at Law  
Law Offices of  
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FOR THE DEFENDANT:

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DeLisio Moran Geraghty  
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ALSO PRESENT:

MR. DOUGLAS SMITH

\* \* \* \*

EXHIBIT D  
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METRO COURT REPORTING

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PURSUANT TO NOTICE, the Deposition of MARK C. NELSON was taken on behalf of the Plaintiff before Cheri Tabor, Notary Public in and for the State of Alaska and Reporter for Metro Court Reporting at the law offices of DeLisio Moran Geraghty & Zobel, P.C., 943 West 6th Avenue, Anchorage, Alaska 99501, on the 15th day of June 2006, commencing at the hour of 10:30 a.m.

\* \* \* \*

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message telephone number.

A 441-8071.

COURT REPORTER: Thank you. Counsel would you please identify yourselves for the record?

MR. COVELL: Kenneth Covell for plaintiff Gilbert.

MS. ZOBEL: Patricia Zobel for APC defendant.

COURT REPORTER: Thank you. You may proceed.

MR. COVELL: Thank you.

DIRECT EXAMINATION

BY MR. COVELL:

Q Mr. Nelson, you were deposed a few years ago on a case called Zuber v. APC, right?

A Correct.

Q And in preparation for today's deposition, did you have an opportunity to review that prior deposition?

A The only prior I've done, is five minutes ago I reread the letter from the State -- and I just did that.

Q Okay. I don't intend to go into depth in your prior deposition, but do you have any reason, even if you haven't reviewed your prior deposition to think your answers would be different today than they would be from back then, at least in general?

A They should -- they should be identical.

Q Okay. And what you just reviewed, was this WHOL-122,

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## PROCEEDINGS

(On record)

COURT REPORTER: My name is Cheri Tabor and I'm a court reporter for Metro Court Reporting in Anchorage.

Alaska. Today's date is June 15, 2006, and the time is approximately 10:30 a.m. We are at the offices of DeLisio

Moran Geraghty & Zobel, P.C., 943 West 6th Avenue, Anchorage,

Alaska 99501 for the deposition of Mark Nelson. This case is in the United States District Court for the District of Alaska.

in the matter of Gilbert v. APC, Case No. 3:03-CV-00174 RRB.

Mr. Nelson, please raise your right hand so I can swear you in.

(Oath administered)

MR. NELSON: I do.

MARK C. NELSON

having first been duly sworn under Oath, testified as follows

on examination:

COURT REPORTER: Thank you. Please state your full name and spell your last name for the record.

A Mark Christian Nelson, N-c-l-s-o-n.

COURT REPORTER: And I need a mailing address for you.

A 3900 C Street, Suite 301, Anchorage, 99503.

COURT REPORTER: I also need a daytime or

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is that the letter you reviewed, the letter from Randy Carr to you?

A Is that the -- yes.

Q Okay. Since 2003, I guess what I'm trying to get at is briefly where you are in the organization since last we spoke. What I understood when we last spoke was you were president of APC Natchiq, is that right or wrong or close?

A Correct.

Q All right. And that was 26 of August 2003, does that sound about right?

A It's right. Correct.

Q Right around August 26th? Okay. So, since then where have you been job wise or organizationally with APC? And I understand that there's AES Energy Services and that's all somewhat unclear to me, but if you could try to briefly run us through your position, let's say relative to your old position -- organizationally?

A 2004, I moved to -- from the presidency of APC to -- the company name was changed to ASRC Energy Services Operations and Maintenance. Sometime in the period after that deposition, until the time I left, we changed the company name. I moved to the parent company, ASRC Energy.

Q Okay.

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1 A Headed up the business development group for the parent  
2 company for about a year. And in the -- December of  
3 this year, moved over at -- a different job offer.  
4 Moved over as a COO of a construction holding company.  
5 Q Which.....  
6 A I'm no longer employed by ASRC Energy Services.  
7 Q Okay. So you went to this construction holding  
8 company, sometime in the last year or so, I think.  
9 A In the last six months.  
10 Q Okay. And so you're out of ASRC entirely, at that  
11 point?  
12 A Right. I'm out of ASRC Energy Services.  
13 Q Is the company you're with now, an ASRC company?  
14 A Yes.  
15 Q And what's the name of that?  
16 A ASRC Construction Holding Company.  
17 Q Okay. So you were in the presidency through '04, and  
18 then you went into marketing and development, is that  
19 right?  
20 A Correct.  
21 Q And what did you market and develop, just briefly?  
22 A Business of ASRC Energy Services.  
23 Q Okay. So you still would have been president in April  
24 '03 when the positions of safety specialist and safety  
25 supervisor were reclassified from exempt to non- -- no,

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1 from non-exempt to exempt?  
2 A Correct.  
3 Q All right. And assuming Mr. Gilbert ended his  
4 employment about April '03, he would have been one of  
5 the employees under your direct command?  
6 A At that time I was president, if he was an employee of  
7 APC, he would have been in a -- in the direct line  
8 of --  
9 Q Okay. And why don't we cover this question right now:  
10 Do you know Mr. Gilbert vaguely or not at all?  
11 A Only by name.  
12 Q Okay. And is that because of the lawsuit or is that  
13 because at the time he was there, you had some exposure  
14 to him?  
15 A Probably a combination of both.  
16 Q Okay. But basically it's.....  
17 A If he walked in here right now, I wouldn't know the  
18 guy.  
19 Q All right. Basically, the familiarity is if you saw  
20 his name on a roster, you'd go, that's one of my guys  
21 or I think that's one of my guys?  
22 A In the context of APC, sure.  
23 Q In Zuber we discussed you examining the position of  
24 safety specialist and making a determination whether or  
25 not that position ought to be eligible for overtime or

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1 not eligible for overtime, right?  
2 A Can you rep- --  
3 Q Sure.  
4 A In this previous deposition?  
5 Q In the previous case, in Zuber -- correct me if I  
6 interchange the names here. In the Zuber case, we  
7 spent a lot of time talking with you about whether or  
8 not the safety specialist job was exempt or non-exempt.  
9 A I don't -- I don't recall. The case -- we spent time  
10 around another position, a warehouseman, may -- we may  
11 have. I'd have to look back to the deposition. I  
12 don't know how much detail in the deposition we talked  
13 about safety specialist.  
14 Q Okay. Well.....  
15 A Well maybe we did, yes.  
16 Q Okay. Let me represent to you that's reflected in your  
17 deposition.  
18 A Okay.  
19 Q That you spent a fair amount of time discussing  
20 conversations with Randy Carr, using some worksheets  
21 concerning questions of whether or not somebody ought  
22 to be exempt under the administrative professional or  
23 other exemptions. Is this refreshing your recollection  
24 at all?  
25 A Yes, okay. Safety special.....

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1 Q Right.  
2 A Not a supervisor.  
3 Q Right.  
4 A Okay, yes.  
5 Q Did you do any examination of the position of safety  
6 supervisor to determine whether or not it ought to be  
7 exempt for overtime or not?  
8 MS. ZOBEL: You're speaking of 1998 or at any  
9 time?  
10 MR. COVELL: Let's say ever, for the time being  
11 and then we can break it down by time.  
12 A At the time, and I don't -- which year this was -- '97,  
13 '90- -- the same timeframe I spoke with the State  
14 representative which was Carr, Randy Carr.  
15 Q Right.  
16 A I -- I went through all position on the North Slope.  
17 Q Okay. And so if Mr. Carr's letter is June 26, '97, it  
18 would be in that timeframe?  
19 A Right.  
20 Q Okay. And you've got a copy of that there with you,  
21 right?  
22 A Right.  
23 Q Okay. And that's alternatively referred to on the face  
24 of it, in the right-hand corner as WHOL-122, right?  
25 A Correct.

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3 (Pages 6 to 9)

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1 MR. COVELL: Why don't we get this marked  
2 number one, here please, madam clerk.  
3 COURT REPORTER: Exhibit N-1 marked.  
4 (Deposition Exhibit N-1 marked)  
5 MR. COVELL: And then just for the record we  
6 should probably make these Z's in front of the APC's, would you  
7 agree with that?  
8 MS. ZOBEL: G. Why would you do Z?  
9 MR. COVELL: Why don't we go off record for  
10 just a second.  
11 (Off record)  
12 (On record)  
13 MR. COVELL: And for purposes of clarity here,  
14 we've agreed that the N-1 will place a Z on each page in front  
15 of the APC numbers, because it's our belief that they came from  
16 the Zuber case originally, in order to avoid confusion with  
17 similarly numbered pages disclosed in Gilbert. All right. I  
18 can get back on my train of thought here.  
19 Q (By Mr. Covell) And in looking at the last two pages  
20 then of N-1, that's that Randy Carr letter of June 26,  
21 '97 to yourself, and it's alternatively designated near  
22 the upper right-hand corner as WHOL-122, is that right?  
23 A Correct.  
24 MS. ZOBEL: Could I ask what the WHOL is?  
25 MR. COVELL: It's wage and hour opinion letter.

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1 MS. ZOBEL: Of course, it is. All right. I  
2 was thinking you had put it on there.....  
3 MR. COVELL: No.  
4 MS. ZOBEL: .....in the prior deposition.  
5 MR. COVELL: Okay.  
6 MS. ZOBEL: Too many numbers in this thing.  
7 MR. COVELL: And acronyms, too.  
8 MS. ZOBEL: Yes.  
9 Q (By Mr. Covell) So, you said, going back -- testing my  
10 memory here, you said at the time contemporaneous to  
11 that, you did a review of all positions in APC?  
12 A Correct.  
13 Q Okay. And one of those --  
14 A It's one of the positions.  
15 Q I apologize, Mr. Nelson, sometimes the questions we ask  
16 sound stupid, but for clarity of the record we have to  
17 ask the redundant questions.  
18 MS. ZOBEL: And I think I need to clarify the  
19 record here with the regard to the safety supervisor position,  
20 because I think that they were different at the time that Mark  
21 was doing this in '97 and '98 and I think that comes from the  
22 testimony of Doug Smith, because when he came in it was a  
23 different -- he created that position. It was different from  
24 what had been held by Mr. Cannon or Gary Buchanan, I think.  
25 Not Gary Buchanan, but other people who had held that. And you

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1 can query him about that, but that's my understanding and I  
2 don't want the record to be messed up because we're talking  
3 applies and oranges.  
4 MR. COVELL: Well that's.....  
5 MS. ZOBEL: See if that's his understanding.  
6 MR. COVELL: All right.  
7 Q (By Mr. Covell) So, around that time of Mr. Carr's  
8 letter, you did a review of the safety supervisor  
9 position to see whether or not he qualified for  
10 overtime or not? He said yes to that question.  
11 Subsequent question now, is tell me what you did in  
12 that regard? In other words tell me how you conducted  
13 your review.  
14 A For a safety supervisor?  
15 Q Uh-huh.  
16 A I started with the position -- the employees in the  
17 position. In the year '96, '97, Bob Cannon was the  
18 supervisor, one of the supervisors, and basically  
19 talked with those employees or that person about the  
20 position. Although at the time, those positions were  
21 direct reports of mine, so I also had a pretty good  
22 background of what they were doing for me as a direct  
23 report. So the combination of those two things, I  
24 could draw a conclusion in that if I felt the -- there  
25 was further research I needed to do, then I would

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1 further research the position.  
2 Q Okay. And did that come to pass or not?  
3 A Well for.....  
4 Q Did you do further research?  
5 A The safety supervisors were a position that I needed  
6 further clarification around which was also part of my  
7 conversation, in general, with the Wage and Hour  
8 Division.  
9 Q All right. So, you talked to Mr. Cannon? You had a  
10 conversation with the Wage and Hour Division and we  
11 should assume that conversation or conversations was  
12 with Mr. Carr or not?  
13 A I know I had at least one conversation with Mr. Carr.  
14 You're drawing on 10 years ago now.  
15 Q Sure.  
16 A I -- I know I talked with him. I can almost remember  
17 some of it very vividly -- the details of the  
18 conversation with Mr. Cannon, but how many  
19 conversations with the State now, I don't recall.  
20 Q Okay. But, it's my recollection, I've looked at your  
21 deposition more recently.....  
22 A Yes, you may be better -- answer the question.  
23 Q I think you said you may have talked to Mr. Carr five  
24 or six times. Something in that nature would be --  
25 okay. But besides -- was there another actor besides

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1 Mr. Carr, that you recollect?  
2 A I don't recall.  
3 Q Okay. So you talked to Cannon and you talked to Carr  
4 and then what conclusion, if any, did you reach about  
5 the exempt or non-exempt status of the safety super- --  
6 let me pull that question. Did you do anything else in  
7 considering whether or not the safety supervisor ought  
8 to be exempt or non-exempt?  
9 A If the file didn't reference a written document, and  
10 with the safety supervisors, I don't recall doing one.  
11 I don't think there was a -- there's a stand checklist.  
12 I -- you've got a copy of it, that we used to do back  
13 then, or I had done a number of them at the time. I  
14 don't recall doing one for the safety supervisors.  
15 Q Okay.  
16 A I doubt that I did given my recollection of the  
17 position at this time.  
18 Q And then you brought up the checklist and whatnot --  
19 papers. I'm not aware of any papers that relate to the  
20 safety supervisor analysis as opposed to there are some  
21 that you mentioned in regard to the safety specialist  
22 position.  
23 A The second tier. Right, that's correct.  
24 Q Okay. And so that -- me not having any comports was  
25 your recollection of what you did?

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1 A Uh-huh (affirmative).  
2 Q Okay. All right. What training or experience did you  
3 have at that time in human relation? I'm sorry, human  
4 resources or employee resources, personnel, whatever  
5 you want to call it that would qualify you to make an  
6 exempt, non-exempt determination?  
7 A Well, I was competent to talk with the State, and read  
8 and understand the regs as best I could interpret. I  
9 think at the time I asked our Anchorage office for  
10 assistance for a second or third opinion and based upon  
11 my formal education, I came to some conclusions around  
12 all of the positions on the North Slope whether they  
13 were exempt or non-exempt.  
14 Q Let me paraphrase here, just to try to move things  
15 along. If I'm suggesting incorrectly, straighten me  
16 out, but you read and write English, you've gone to  
17 school, you have a degree in accounting, you can  
18 analyze things as well as the next person on the street  
19 so to speak, or perhaps better because of your training  
20 and education of whatever field you're in, and that  
21 enables you to make that determination, is that  
22 essentially what you're telling me?  
23 A Correct.  
24 Q Okay. And then my question, at least in part, leans  
25 toward saying besides having the abilities that many

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1 might, do you have any specialized training, education  
2 or experience that would lend you an ability perhaps  
3 above somebody else with that and I don't mean to  
4 demean accounting, but to call it the generic  
5 education, training and experience as opposed to some  
6 nature of specialized training, experience or education  
7 in the area of human resources? Do you under that as a  
8 question?  
9 A Is that a question?  
10 Q That was the question.  
11 A I'm not sure I know how to answer. Let me.....  
12 Q All right. Do you have specialized training and  
13 experience in human resources?  
14 A Outside of the work place, beyond conference -- I think  
15 one of them lies with the State or some of those --  
16 Q Okay. You've been in conference or seminar, but  
17 generally not?  
18 A Those are specialized trainings around wage and hour,  
19 they last 3, 4 days -- put on by the State, that type  
20 of thing. Beyond that, no.  
21 Q Okay.  
22 MR. COVELL: I'd like to take a brief pause  
23 here madame reporter.  
24 (Off record)  
25 (Deposition Exhibit N-2 marked)

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1 (On record)  
2 MR. COVELL: Mr. Nelson, we marked for you  
3 Exhibit N-3, is it?  
4 COURT REPORTER: N-2.  
5 Q (By Mr. Covell) N-2, which is your former deposition  
6 and I directed your attention to pages 26, line 23  
7 through page 28, line 20. You've had a chance to read  
8 that off record?  
9 A (No audible answer)  
10 Q You need to answer audibly.  
11 A Okay. I'm sorry. I didn't understand it was a  
12 question -- yes.  
13 Q All right. Thank you. Is what you're saying there in  
14 that passage about a review of the safety supervisor  
15 position, the same thing you're telling me today?  
16 A Yes.  
17 Q Okay.  
18 (Off record comments)  
19 Q And besides that review then you did at that time of  
20 the safety supervisor position for eligibility for  
21 overtime from that time until you left your job as  
22 president in 2004, were you involved in any other  
23 reviews of the safety supervisor position for  
24 eligibility of overtime?  
25 A No.

5 (Pages 14 to 17)

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